

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Savannah Division

IN RE:	)	Chapter 11 Case
	)	Number <u>88-40864</u>
HAILE COMPANY	)	
d/b/a HAILE TOBACCO COMPANY	)	
	)	
Debtor	)	
_____	)	
HAILE COMPANY	)	
d/b/a HAILE TOBACCO COMPANY	)	
	)	
Plaintiff	)	
	)	
vs.	)	Adversary Proceeding
	)	Number <u>90-4118</u>
R. J. REYNOLDS TOBACCO COMPANY,	)	
PHILLIP MORRIS, LORILLARD, INC.,	)	
BROWN & WILLIAMSON TOBACCO	)	
CORPORATION, THE AMERICAN	)	
TOBACCO COMPANY AND	)	
U.S. TOBACCO COMPANY	)	
	)	
Defendants	)	

**ORDER**

Before the court is the objection of defendants, members of the creditors' committee in the underlying Chapter 11 case, to an interrogatory propounded by plaintiff seeking to discover all communications to defendants from Kathleen Horne, the attorney for defendants as members of the creditors' committee. Plaintiff's interrogatory numbered 3 states: "Identify by date and subject matter each and every letter, note, memorandum or other writing received from the Attorney for the Creditors' Committee."

Defendants contend that communications from Ms. Horne are not subject to discovery because any such communications are protected by the attorney/client privilege.

Plaintiff, Haile Company, d/b/a Haile Tobacco Company, the Chapter 11 debtor, brought this action alleging defendants took certain actions intended to harm plaintiff's business relations in furtherance of a conspiracy to drive plaintiff out of business. In addition to other alleged conspiratorial acts, plaintiff claims defendants, in bad faith, filed a motion to convert plaintiff's Chapter 11 case and mailed notice of the motion to plaintiff's creditors solely in an effort to cause plaintiff's creditors to discontinue business with plaintiff. Essentially plaintiff contends defendants, through various acts, including acts otherwise lawful under the Bankruptcy Code, tortiously interfered with plaintiff's business relationships and thereby drove plaintiff out of business. Defendants deny plaintiff's allegations of bad faith. Defendants claim that filing the motion to convert was a clerical error on the part of Ms. Horne's staff and that no conspiracy to drive plaintiff out of business existed.

Under Federal Rule of Civil Procedure (FRCP) 26(b), made applicable to this adversary proceeding by Bankruptcy Rule 7026, parties may discover "any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . " FRCP 26(b)(1) (emphasis added). Pursuant to Federal Rule of Evidence

501,<sup>1</sup> made applicable here by Bankruptcy Rule 9017, application of the attorney/client privilege in this adversary proceeding to an apparent State law cause of action sounding in tort, see Haile Co. v. R. J. Reynolds Tobacco Co. (In re: Haile Co.), Ch. 11 case No. 88-40864 Adv. 90-4118 (Bankr. S.D. Ga. Dalis, J. Oct. 25, 1991), is governed by State law. Georgia<sup>2</sup> case law provides that communications from attorney to client, such as those plaintiff seeks to discover in interrogatory numbered 3, are "governed by

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<sup>1</sup>Rule 501 provides as follows:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

<sup>2</sup>The choice of law rules of the forum state, Georgia, apply. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.E.2d 1477 (1941). In Georgia, tort actions are governed by the law of the state where the alleged tort occurred. Karimi v. Crowley, 324 S.E.2d 583, 584 (Ga. App. 1984). Although the parties have not directly addressed the issue, it is evident that the alleged tortious acts in this case, various acts by defendants in furtherance of a conspiracy to interfere with plaintiff's business relationships and thereby drive plaintiff out of business, and without question the actions of the creditors' committee counsel, took place in Georgia. Accordingly, Georgia law on the attorney/client privilege governs this discovery dispute.

long-standing, express statutory provisions of this state." Southern Guar. Ins. Co. of Ga. v. Ash, 383 S.E.2d 579, 581 (Ga. App. 1989). Under Official Code of Georgia (O.C.G.A.) §§24-9-21, 24-9-24 and 24-9-27(c), confidential legal advice is privileged and therefore not subject to discovery.<sup>3</sup> The burden is on the party invoking the privilege to establish that the privilege applies to the communication sought to be discovered, Southern Guar. Ins. Co. of Ga., supra, at 583, which generally is accomplished by showing that an attorney/client relationship existed and that the communication in question was confidential legal advice. See id. at 583-84.

Plaintiff does not argue that the communications it seeks to discovery were not confidential attorney/client communications. Rather, plaintiff argues that defendants waived the privilege as to all communications from Ms. Horne by asserting reliance on advice of counsel as a defense to plaintiff's allegations in its complaint. Defendants contend there was no waiver of the privilege and point out that plaintiff fails to show where in the record defendants raised reliance on advice of counsel as an affirmative defense to plaintiff's cause of action. Defendants also state that there were no communications from Ms. Horne concerning the filing of the motion

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<sup>3</sup>O.C.G.A. §24-9-21 provides in pertinent part: "There are certain admissions and communications excluded on grounds of public policy. Among these are: . . . communications between attorney and client." O.C.G.A. §24-9-24 provides in pertinent part: "The attorney shall not disclose the advice or counsel he may give to his client. O.C.G.A. §24-9-27(c) provides: "No party or witness shall be required to make discovery of the advice of his professional advisers or his consultation with them."

to convert and the notice of the motion and thus none to be discovered. An affidavit by Ms. Horne supports defendants' contention that there were no such communications. As to any other communications, defendants argue, those communications are irrelevant to this adversary proceeding, as well as protected by the attorney/client privilege.

As Georgia case law is scarce on the waiver issue, federal law may be looked to in determining whether waiver occurred. See Marriott Corp. v. American Academy of Psychotherapists, Inc., 277 S.E.2d 785, 791-92 (Ga. App. 1981). It is generally recognized in federal courts that a defendant may not raise advice of counsel as an affirmative defense and simultaneously invoke the privilege to prevent disclosure of counsel's advice. Lorenz v. Valley Forge Ins. Co., 815 F.2d 1095, 1098 (7th Cir. 1987); Barr Marine Products Co. v. Borg-Warner Corp., 84 F.R.D 631, 635 (E.D. Pa. 1979); American Intern. Airways, Inc. v. American Intern. Group, Inc., 1991 WL 255661 (E.D. Pa. 1991). Accord Bailey v. Baker, 232 Ga. 84, 205 S.E.2d 278, 280 (1974). Although defendants categorically deny plaintiff's allegations of bad faith in all conduct relative to plaintiff's complaint, defendants have not put any communication from Ms. Horne into issue by asserting such communication as an affirmative defense to plaintiff's complaint. Therefore, defendants did not waive the attorney/client privilege.

Plaintiff also argues that communications from Ms. Horne are excepted from protection under the attorney/client privilege because the communications were made in furtherance of tortious

conduct. Communications otherwise protected by the attorney/client privilege are discoverable if the communications relate to contemplated or ongoing criminal, fraudulent, or tortious conduct. See Marriott, supra, at 790; Southern Guar. Ins. Co. of Ga., supra, at 583. See also Clark v. United States, 289 U.S. 1, 15, 53 S.Ct. 465, 469, 77 L.E.2d 993 (1933); In re: Grand Jury Subpoena Duces Tecum, 731 F.2d 1032, 1038 (2nd Cir. 1984). "Mere allegations of [tortious conduct] are not, however, sufficient to break the privilege." Ward v. Succession of Freeman, 854 F.2d 780, 790 (5th Cir. 1988), reh'g denied, 863 F.2d 882 (1988), cert. denied, 490 U.S. 1065, 109 S.Ct. 2064, 104 L.E.2d 629 (1989). Although it remains unsettled exactly what quantum of proof is necessary to defeat the privilege based on the crime/fraud/tort exception, United States v. Zolin, 491 U.S. 554, 563, n. 7, 109 S.Ct. 2619, 2626 n. 7, 105 L.E.2d 469 (1989), the evidence must be sufficient to cause a reasonable person to suspect perpetration of a crime, fraud or tort and that the communications were in furtherance of the unlawful activity. Grand Jury Subpoena Duces Tecum, supra, at 1039; cf. Ward, supra, at 790. In this case, however, plaintiff merely asserts that the attorney/client privilege is defeated because its cause of action alleges a conspiracy sounding in tort. Plaintiff presents no independent evidence of any communications by Ms. Horne to defendants in furtherance of a conspiracy to drive plaintiff out of business, nor any independent evidence of such a conspiracy. Plaintiff has failed to make a prima facie showing that an exception to the privilege applies. Clark, supra. For the same reason, I

find it is unnecessary to exercise my discretion to conduct an in camera inspection of all documented communications from Ms. Horne to defendants to determine whether the crime/fraud/tort exception defeats the privilege in this case. See generally Zolin, supra, 491 U.S. at 572-75, 109 S.Ct. at 2631-32.

In addition to the discovery objection, defendants object to plaintiff's use at trial of certain documents inadvertently produced for plaintiff. Defendants contend these documents are also protected by the attorney/client privilege even though the documents were produced for plaintiff. Plaintiff argues the attorney/client privilege was waived as to these documents by defendants' "voluntary" disclosure of the documents. However, under Georgia law, inadvertent disclosures during discovery of a communication protected by the attorney/client privilege do not waive the privilege and therefore such documents are inadmissible evidence at trial. Marriott, supra, at 790.

I need not address plaintiff's argument in its brief that Ms. Horne's actions in filing the motion to convert and noticing the motion are binding on defendants under Georgia agency law as this argument is inappropriate in response to defendants' discovery objections, having nothing to do with the issue before me.

Also pending before the court is defendants' motion for a protective order concerning recently filed "Plaintiff's Request For Production of Documentary Evidence to Third Party [Kathleen Horne]," wherein plaintiff seeks to discover from Ms. Horne all

correspondence between defendants and Ms. Horne pertaining to plaintiff's Chapter 11 case. Under FRCP 34(c),<sup>4</sup> made applicable here by Bankruptcy Rule 7034, service of requests for production of documents on a nonparty must be by subpoena pursuant to the provisions of FRCP 45, made here applicable by Bankruptcy Rule 9016.<sup>5</sup> As plaintiff's request for production to Ms. Horne, a nonparty in this lawsuit, was served without a subpoena as required by FRCP 45, the request for production is procedurally deficient. If in the future plaintiff serves on Ms. Horne requests for production which comply with FRCP 45, discovery of any documented communications from Ms. Horne to defendants contained in Ms. Horne's file on plaintiff's Chapter 11 case is subject to the provisions of this order.

It is therefore ORDERED that defendants' objection to plaintiff's discovery concerning communications from defendants' attorney, Kathleen Horne, is sustained, the communications being privileged attorney/client communications. Defendant is not required to respond further to plaintiff's interrogatory numbered 3, quoted supra;

further ORDERED that any documents in plaintiff's possession containing correspondence from defendants' attorney,

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<sup>4</sup>FRCP 34(c) was recently amended, effective December 1, 1991, to provide as follows: "A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45." (Emphasis added).

<sup>5</sup>FRCP 45 was also recently amended, effective December 1, 1991.



Kathleen Horne, to defendants will not be admitted as evidence at trial;

further ORDERED that "Plaintiff's Request for Production of Documentary Evidence to Third Party" is quashed, being procedurally defective;

further ORDERED that defendants' motion for a protective order is denied as moot.

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JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this \_\_\_\_\_ day of March, 1992.